Supreme Court, U.S.
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No. 87-1105

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

GEORGE F. COMBS,

Petitioner,

vs.

SEABOARD SYSTEM RAILROAD, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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QUESTIONS PRESENTED

1) May a State Court Judge usurp unto himself the province of the Jury, namely the decision and resolution of factual issues on a Rule 56 motion for summary judgment in cases under 45 U.S.C. 51 et seq.?

2) Do the decisions of the Tenth Circuit Court of Appeals in *Atchison T. and S.F. R. Co.* v. *Wottle*, 193 F 2d 628 (1952), conflict with the opinions of Second Circuit Court of Appeals in *Mostyn* v. *Delaware L & W RR Co.*, 160 F 2d 15 (1964), and Third Circuit Court of Appeals in *Carney* v. *Pittsburgh & Lake Erie RR Co.*, 316 F 2d 277 (1963)?

3) Should the Supreme Court exercise its authority to clarify the conflicts between the lower courts by declaring the proper interpretation of the Federal Employers Liability Act in off premises injuries, and particularly the role of the jury in deciding conflicting factual issues thereunder?

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vs.

SEABOARD SYSTEM RAILROAD, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States

Petitioner, George F. Combs, prays that a Writ of Certiorari issue to review the order and judgment of the Court of Appeals of the Commonwealth of Kentucky, entered in that Court in the above entitled case affirming the Judgment of the Whitley Circuit Court. A Motion for Discretionary Review was refused by the Supreme Court of Kentucky.

OPINIONS BELOW

The opinion of the Court of Appeals, not as yet reported is attached hereto as Appendix A. The opinion of the Whitley Circuit Court is attached hereto as Appendix B. The refusal of the Supreme Court of Kentucky is attached at Appendix C.

JUDGMENT

The judgment of the Court of Appeals of Kentucky sought to be reviewed was refused hearing by the Supreme Court of Kentucky by order dated April 21, 1987.

Jurisdiction to review said judgment by Writ of Certiorari is believed to be conferred on the Supreme Court by the provisions of Title 28, U.S. Code, Section 1257 (3).

STATEMENT OF THE CASE

Tersely stated, may a State Court Judge usurp unto himself the province of the jury, namely the decision of factual issues which pertain to an injured railroad employe's claim for damages arising out of his employment under 45 U.S.C. 51 et seq.

The trial court (Kentucky-Whitley County Circuit Court) granted a motion for summary judgment against the Plaintiff employe and in favor of the Defendant Railroad. The ruling of the trial court was sustained upon appeal by the Kentucky Court of Appeals.

The issue upon which the trial court deprived the Plaintiff of his right to a jury trial was a facutal issue namely, the determination of Plaintiff's scope of employment. Scope of employment is generally a factual question for jury decision. In the instant case, the Railroad instructed and sent Plaintiff from his home, Covington, Kentucky, to Corbin, Kentucky, to stay at Corbin Motor Lodge. The Railroad selected and paid for his accommodation and granted meal allowance. Plaintiff checked with the Railroad, as obligated, at 12:15 p.m. and was instructed to take his eight hour rest period. At about 7:00 p.m., he went to a restaurant on the motel premises to eat. The restaurant was very crowded. Plaintiff decided not to wait and when exiting the restaurant, slipped and fell on ice near the doorway and was severely injured.

Modern Railroad practices have employes at temporary locations, living on and off the railroad's premises for the con-

venience of the employer. Numerous cases have held coverage of the Act applies to these off premises and "off duty" employes. A certain number of cases have held coverage of the Act does not extend to these employes under the circumstances presented.

This Court has had little to say concerning off premises, or safe place to work since its pronouncement in *Sinkler* v. *Missouri Pacific Railroad Company*, 356 U.S. 326, 2 L. Ed. 1152, which basically provided that the railroad had a nondelegable duty to provide a safe place to work to employees whether on or off the premises, or whether an "independent contractor" was hired to perform railroad duties.

It will be difficult to lay down a precise verbal formula to be applied automatically to determine the distinction between an employee's activities within and those without the coverage of the Act, however, this Court should lay down guidelines for the lower Courts to follow so that the present olio and hodgepodge of lower Court decisions could be avoided. More particularly, the guidelines should iterate the concept of federal paramountcy in these cases under the Act, and stress that when there are factual questions the right to a trial by Jury is a substantive right not to be eroded by niggardly interpretation or a false sense of judicial economy. This Court, has, in the past, repeatedly stated to appellate Courts that the Judges may not interfere with a jury verdict when it appears there is any evidentiary basis,

> "It being immaterial that the Court might draw a contrary inference or feel another conclusion to be more reasonable."

Lavender v. *Kurn*, 327 U.S. 645, 90 L. Ed. 917

The law requires that any material issue, derived from the facts in this or any case, should be submitted to the jury under the Act. This Court should state strongly that Judges in summary judgment proceedings should never substitute judicial feelings for a future jury's finding. Although some

State Courts may find the scope of the Act foreign or even distasteful, under the state law interpretations, this is an issue of federal paramountcy. Under this Act, on a motion for summary judgment, the trial judge must look at the facts through a prism that reflects and divides in the same fashion as an impartial jury's consideration. To achieve some uniformity of decisions in all lower Courts, and maintain federal paramountcy, this issue should be addressed presently.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Circuit Court of Whitley County, Kentucky, and the Court of Appeals of Kentucky, decided that the Plaintiff, from the facts involved, had no cause of action against the Defendant Railroad. In each instance, the Court *weighed* the facts surrounding the incident of injury and concluded that those facts did not constitute a cause of action because the Plaintiff was "off duty" and "outside the scope of his employment."

In the instant case, Plaintiff was assigned to work at Corbin, Kentucky, approximately one hundred and twenty miles from his home and base in Covington, Kentucky. The Defendant transported him and other crew members to accommodations supplied by the Railroad at Corbin Motor Lodge. At 12:15 p.m. on arrival at the Motel, Plaintiff reported to the Railroad and was advised that he should take his eight hour rest period. Plaintiff pursued his own activities, showering, shaving and browsing in a book store. At about 7:00 p.m., he returned to the Motel to eat, and be available for his call to service at 8:15 p.m. The restaurant was very crowded and Plaintiff decided not to wait to eat and when exiting, slipped and fell suffering injury.

The Court of Appeals for Kentucky stated (Opinion Appendix A)

> "We are cited to cases which appear to go in opposite directions in terms of F.E.L.A. coverage for activities undertaken during off duty or enforced rest periods. We have opted to align ourselves with reasoning set forth in *Fowler* v. *Seaboard Coastline R. Co.,*" 638 F2d 17 (5th Circ. 1981)

The action of the Court of Appeals resulted from the Court, instead of the Jury, *weighing* the evidence and concluding that Plaintiff's return to the Motel to eat was a purely private activity on his behalf, and therefore no reasonable mind could conclude that Plaintiff was within the scope of his

employment. In the *Fowler* case, supra, the facts are totally disparate to the facts in the instant matter and the Kentucky Court of Appeals, in weighing the facts in this case, violated its prerogatives in granting summary judgment.

In *Mostyn* v. *Delaware L & W RR Co.*, 160 F2d 15 (2nd Circ. 1954) at P. 17-18, the Court stated:

> "It seems to us that when a railroad provides shelter or food or both for its employees, they are using the accommodations so provided to prepare themselves for their work, or to rest and recuperate, they must be regarded as in its employ."

Carney v. *Pittsburgh & Lake Erie RR*, 316 F2d 277 (3 Circ. 1963), held that the Plaintiff's sleeping activity at the "Y.M.C.A." that night was well within the scope of his employment "just as much a part of enterprise as when Carney was stringing cable" (316 F2d at 281).

Kooker v. *Pittsburgh and Lake Erie Railroad Company*, 258 F 876 (6th Circ. 1958) in headnote 3, stated:

> "The obligation of an employer to provide his servants with a safe place to work may extend beyond his premises and to property which third persons have a primary obligation to maintain. See also *Oliver* v. *Chesapeake & Ohio Railway Co.*, 151 N.E. 2d 371.

In accord with these decisions are *Casso* v. *Pennsylvania R.R.*, 219 F.2d 303 (3 Circ. 1955) and *Kimbler* v. *Pittsburgh and Lake Erie RR Co.*, 331 F2d 383 (3rd Circ. 1964).

A conflicting decision appears in *Atchison, T. and S. F. R. Co.* v. *Wottle*, 193 F.2d 628 (10th Circ. 1952) wherein the Court of Appeals decided when decedent (killed in an auto accident far off the railroad premises) set out in his own car to obtain groceries for himself, he was:

> "On missions wholely unconnected and unrelated to his employment, and his injury while thus engaged cannot be said to be in Commerce within the meaning of the Act." *Id*, 193 F.2d 631.

The great majority of these cases are received by the Courts of Appeal after a trial to a Jury. The *Fowler* case was on summary judgment and on the facts presented for the Rule 56 motion was a correct decision. However, the facts are not a pari with the facts in the instant case. The *Kooker* case was a directed verdict under Rule 50, which in its import is akin to Summary Judgment, but allows all the evidence to be before the Court. The directed verdict was reversed and a new trial ordered.

This Court in *Jack Anderson, et al.* v. *Liberty Lobby, Inc.*, ____ U.S. ____, 91 L. Ed. 2nd 202, laid down guidelines for the application of a motion for summary judgment in a libel case, wherein it was necessary to prove actual malice by clear and convincing evidence. Petitioner believes that guidelines are necessary for lower Courts in Summary Judgments in F.E.L.A. cases.

The issue is federal paramountcy. Since the 1939 amendment to the Act, the intent of Congress was, and still should be, that Jury trial is an integral part of the injured workers' rights. Jury trial is an imperative wherever and whenever there is a facutal issue involved. It has been stated that if reasonable minds could differ as to the import of the evidence, a verdict should not be directed. *Wilkerson* v. *McCarthy*, 338 U.S. 53.

This Court stated in *Meyers* v. *Reading Railroad Co.*, 331 U.S. 477:

> "It is only in the absence of all probative facts which a jury may draw its conclusion that reversible error appears."

Again, in *Jones* v. *East Tennessee*, 128 U.S. 433:

> "So long as the jury system is the law of the land the Jury is made the tribunal."

Under a motion for Summary Judgment, Rule 56, all questions must be resolved against the movant if there is evidence of a factual issue, or facts from which differing reasonable in-

ferences could be drawn. In the instant case, the Petitioner was where he should have been, at the Motel, when he was injured, and eating or preparing to eat is a reasonable part of rest and recuperation. The Court ruling on a Motion for Summary Judgment must look at the law as it applies in cases under the Act, and if there is any question of material fact upon which a reasonable mind could differ then such case is for a Jury decision, and summary judgment should not be granted.

In the instant case, the same motion for Summary Judgment was filed in the District Court for the Eastern District of Kentucky (Bertelsman, Judge). The motion was overruled by Judge Bertelsman. Since that ruling, the judgments in the State Court, absent this Petition, have become final; the ruling of J. Bertelsman, under "full faith and credit clauses" is moot. However, it underscores the evidentiary question that there are facts involved upon which reasonable minds have disagreed.

This Court, by stating guidelines concerning summary judgment in F.E.L.A. cases, would remove the distressing conflicts and uncertainties into which lower Courts have fallen. For that reason, the writ should be granted in the within cause.

CONCLUSION

Petitioner submits that this Court has not since its ruling in *Sinkler* v. *Missouri Pacific Railroad Company*, supra, given any guidance in the area of "off duty, off premises" injuries to railroad workers under the Act. This Court has not issued guidelines to be followed in Summary Judgment proceedings under the Act. Lower Courts have confused factual issues and permissible inferences therefrom, causing recurrent inconsistencies in the rulings of lower courts.

The Court of Appeals for the State of Kentucky erroneously decided that there was no factual issue for jury consideration substituting its decision by weighing of the evidence and depriving Petitioner of his right to a trial by Jury; the Petition for a Writ of Certiorari should be granted, and the Court of Appeals for the state of Kentucky reversed.

Respectfully submitted

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APPENDIX A

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 86-CA-741-S

GEORGE F. and REBECCA COMBS
APPELLANTS

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
SEABOARD SYSTEM RAILROAD, INC. and
CORBIN MOTOR LODGE
APPELLEES

Appeal From Whitley Circuit Court
Honorable Emby A. McKeehan, Judge
Action No. 84-CI-535

AFFIRMING IN PART — REVERSING IN PART
(Opinion rendered December 12, 1986, 10:00 a.m.)
NOT TO BE PUBLISHED

* * *

BEFORE: HAYES, Chief Judge, HOWERTON and REYNOLDS, Judges.

HAYES, CHIEF JUDGE: The question presented is whether the trial court erred in summarily disposing of appellants' claims for damages stemming from a fall on ice on the premises of Corbin Motor Lodge. We are convinced that summary judgment is inappropriate insofar as the negligence claim against Corbin Motor Lodge is concerned, but appellants' claim under the Federal Employees Liability Act was properly dismissed.

We agree with appellants' contention that since the advent of comparative negligence in this state, *Hilen* v. *Hayes*, Ky., 673 S.W.2d 713 (1984), proof of some degree of negligence on the plaintiff's part no longer operates to bar his claim. Fault becomes a question of degree and measuring the degree of each parties' fault is the province of the jury. Here, we find a plaintiff who followed other patrons in traversing an icy entrance to a restaurant on the Lodge's premises and a business establishment which has allowed ice to accumulate on its sidewalk. Reasonable minds could differ as to the degree of negligence present in each parties' actions and thus the finder of fact is asked to compare the fault of one to that of the other. We are convinced it was error for the trial judge to usurp this function.

Appellants also asserted a claim against L & N and Seaboard for negligence in failing to provide Mr. Combs a safe workplace. The railroad maintains that the trial judge properly dismissed this claim as appellant was not performing his duties or engaging in activities incident thereto at the time of his injury. We agree.

In his testimony, Mr. Combs admitted he was on his own free time for eight hours. We are mindful of the relationship the railroad maintained with the motel, but we are nevertheless convinced Mr. Combs' activities at the time of the accident were in no way work related. Under appellants' interpretation, Mr. Combs would have been covered by FELA if he had injured himself bowling. Our credulity simply does not stretch far enough to cover this contention. The railroad was not directing Mr. Combs' activities at the time of the accident; he was, as he stated, "on his own" for eight hours. His activities cannot be construed as even approaching the "scope of employment" essential to coverage under the Act.

We are cited to cases which appear to go in opposite directions in terms of FELA coverage for activities undertaken during off-duty or enforced rest periods. We have opted to align ourselves with reasoning set forth in *Fowler* v. *Seaboard Coastline R. Co.*, 638 F.2d 17 (5th Cir. 1981), which holds that when an employee undertakes a purely private activity,

even upon his employer's premises, he is denied recovery under FELA. In the instant case, Mr. Combs had stopped for a cup of coffee and was on his way to visiting hours at a funeral home when he was injured. We believe this is purely private activity outside the protection of FELA.

The judgment of the Whitley Circuit Court, as to appellees L & N Railroad Company and Seaboard System Railroad, is hereby affirmed. The judgment as to Corbin Motor Lodge is reversed and the case remanded for further proceedings.

Further, pursuant to 2.(a) of the Order designating the Case as a Special Appeal, the application of CR 76.20 and CR 76.32, as well as other appropriate Rules of Civil Procedure pertaining to further appellate steps, are reinstated effective the date of this opinion.

ALL CONCUR.

APPENDIX B

COMMONWEALTH OF KENTUCKY
34th JUDICIAL CIRCUIT
WHITLEY CIRCUIT COURT

CIVIL ACTION NO. 84-CI-535

GEORGE F. COMBS AND REBECCA COMBS,
PLAINTIFFS

VS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY AND SEABOARD SYSTEM RAILROAD, INC., AND CORBIN MOTOR LODGE,
DEFENDANTS

FINAL JUDGMENT OVERRULING PLAINTIFFS' MOTION FOR RELIEF MAILED NOVEMBER 26, 1985 AND SUSTAINING MOTION OF DEFENDANTS, L & N RAILROAD COMPANY AND SEABOARD SYSTEM RAILROAD, INC., FOR SUMMARY JUDGMENT

* * * * * * * * *

This matter came before the Court on a series of Motions as follows:

1. On August 8, 1985 the defendant, Corbin Motor Lodge, served Motion for Summary Judgment which Motion was duly briefed by counsel for defendant, Corbin Motor Lodge, and counsel for plaintiffs, George F. and Rebecca Combs. On November 5, 1985 an Order was entered sustaining this Motion.

2. On November 26, 1985 the plaintiff served and mailed for filing a Motion entitled "Plaintiffs Combs' Motion for Relief Pursuant to KRCP 60.02(f); or in the alternative, to make summary judgment final and appealable under KRCP 54.02".

3. On the 27th day of November, 1985 Motion for Summary Judgment was served and filed in behalf of defendants, Louisville and Nashville Railroad Company and Seaboard System Railroad, Inc.

4. The Motion of the plaintiffs for relief and the Motion by the defendants, Louisville and Nashville Railroad Company and Seaboard System Railroad, Inc., for summary judgment were briefed by the parties and on Friday, February 21, 1986 these Motions were heard by the Court.

5. The Court having studied the record and carefully evaluated the whole case has concluded that he was correct in his ruling on the Motion for Summary Judgment filed in behalf of the Corbin Motor Lodge and therefore is of the opinion that the Motion of the plaintiff for relief should be overruled; and is of the further opinion that with respect to the Motion of defendants, Louisville and Nashville Railroad Company and Seaboard System Railroad, Inc., for Summary Judgment, that there is no genuine issue of material fact and these defendants are entitled to judgment as a matter of law, and therefore being advised,

IT IS ORDERED that the Motion of the plaintiffs for relief served November 26, 1985 be and it is hereby overruled; and the Motion of the defendants, Louisville and Nashville Railroad Company and Seaboard System Railroad, Inc., for summary judgment is hereby sustained.

This is the final judgment of this Court dismissing all claims of the plaintiffs.

This 25 day of Feb., 1986.

/s/ EMBY A. McKEEHAN
Judge, Whitley Circuit Court

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APPENDIX C

SUPREME COURT OF KENTUCKY
86-SC-1088-D
(86-CA-741-D)

WHITLEY CIRCUIT COURT
NO. 84-CI-535

GEORGE F. COMBS and REBECCA COMBS
MOVANTS

V.

LOUISVILLE & NASHVILLE RAILROAD COMPANY/SEABOARD SYSTEMS, INC.
RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion of the movants for a review of the decision of the Court of Appeals is denied.

ENTERED April 21, 1987.

/s/ ROBERT F. STEPHENS
Chief Justice

Supreme Court, U.S.
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No. 87-105

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GEORGE F. COMBS,

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SEABOARD SYSTEM RAILROAD, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether there were factual issues sufficient to require intervention of a jury.

II. Whether the trial court and the Court of Appeals correctly applied the law under 45 USC § 51 to the facts as given.

III. Whether review by this Court will assist lower courts in deciding cases under the Federal Employers' Liability Act.

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No. 87-105

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GEORGE F. COMBS,

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SEABOARD SYSTEM RAILROAD, INC.,

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

It should be noted that the opinion of the Court of Appeals of Kentucky is "Not to be Published" (Appendix A), and therefore will not be reported, and will not be binding authority in any subsequent action.

COUNTERSTATEMENT OF THE CASE

Tersely stated, this is not a usurpation of a jury province by a state court judge. If the facts are undisputed, as in this case, the trial court must determine the question of law, which is whether the plaintiff was within the scope of employment by the defendant.

It is true that the trial court (Commonwealth of Kentucky — Whitley County Circuit Court) granted a motion for summary judgment against the plaintiff employee in favor of the defendant railroad. This ruling was sustained upon appeal by the Kentucky Court of Appeals, and the Kentucky Supreme Court denied discretionary review. What is overlooked by the plaintiff-petitioner is that in making this summary judgment, the trial court relied solely on and accepted the testimony of the plaintiff as to what happened on the night in question. Thus, there could be no material issue of fact. There could be no issue of fact period. The only issue that was decided by the trial court was the legal issue: Was the plaintiff within the scope of his employment for purposes of maintaining an action under the Federal Employers' Liability Act, 45 U.S.C. § 51?

Petitioner, George F. Combs, had been a conductor for the SEABOARD SYSTEM RAILROAD, INC. since 1964. He testified that on December 27, 1983, he and approximately eight other men were taken from Covington, Kentucky to Corbin, Kentucky for the purpose of conducting a train from Corbin back to Covington. Combs arrived in Corbin at approximately 12:15 p.m. and reported directly to the train master who told Mr. Combs to take his eight hour rest period and be prepared to report back for duty at 8:45 p.m. At this time, Mr. Combs went to the Corbin Motor Lodge, where Seaboard had secured rooms for its employees, and unpacked. By Mr. Combs' own testimony, at this time he was on his own, and could do anything that he pleased until he was to report back to work at 8:45 p.m. It is important to note that Mr. Combs was not on call, was not instructed to remain on the premises, and that Seaboard had no control over his activity until such time as he was to return to his room at 8:45 p.m. After unpacking, Mr. Combs and a friend proceeded to the D & W Restaurant in a shopping center on the east side of town. After eating at the restaurant, they browsed in a book store for awhile and then proceeded, in Mr. Combs' personal automobile, to the restaurant adjacent to the Corbin Motor Lodge, arriving there at approximately 7:00 p.m. After hav-

ing a cup of coffee at the restaurant, it was Mr. Combs' intention to proceed to the funeral home in town where services were being held for an old friend of his. After visiting the funeral home, he was then going to return to his room at 8:45 p.m. and await his call to duty. Unfortunately, upon entering the restaurant adjacent to the Corbin Motor Lodge, Mr. Combs found that it was entirely too crowded, due to the inclemate weather conditions at that time, and upon exiting the restaurant, Mr. Combs slipped on the ice causing the injuries complained of herein.

No other evidence was before the court and therefore all of the above facts, as stated by the petitioner, were uncontroverted.

SUMMARY OF ARGUMENT

1. The trial court accepted the version of facts as supplied by the petitioner, and merely applied the law to those facts. Thus, the trial court did not invade the province of the jury.

2. The trial court correctly applied the law that an employee performing a private activity for a private purpose is not acting within the scope of his employment.

3. Whether or not a particular employee is acting within the scope of his employment is necessarily decided on a case-by-case basis, and review here will do little, if anything, to assist lower courts.

ARGUMENT

THE TRIAL COURT ACCEPTED THE VERSION OF FACTS AS SUPPLIED BY THE PETITIONER, AND MERELY APPLIED THE LAW TO THOSE FACTS. THUS THE TRIAL COURT DID NOT INVADE THE PROVINCE OF THE JURY.

It needs no citation of authority to know that once facts are established the trial judge applies the law to those facts. That is exactly what happened in the case below. The trial judge decided no factual issue, but merely accepted the facts as were testified to by the petitioner himself.

Contrary to the assertion made in the petition for certiorari, the petitioner was not on the premises of the hotel where he was boarded by the defendant at the time the accident occurred. He was at a restaurant adjacent to the hotel. More importantly, he was not at the restaurant to eat and then return to work, or to wait for a call to work. The petitioner's own frank and candid version of the events of that evening was that he was on his way to funeral visitation for a deceased friend when, while walking down the sidewalk of the restaurant, he slipped and fell.

The trial judge accepted the petitoner's uncontroverted version of these facts and entered judgment based on those facts. There simply is no factual issue here.

THE TRIAL COURT CORRECTLY APPLIED THE LAW THAT AN EMPLOYEE PERFORMING A PRIVATE ACTIVITY FOR A PRIVATE PURPOSE IS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT.

It is established law that in order for a plaintiff to recover under a Federal Employers' Liability Act claim, he must show:

1. That the defendant is a common carrier by a railroad engaged in interstate commerce;

2. That the plaintiff was employed by the defendant with the duties furthering such commerce;

3. That the injuries were sustained while the plaintiff was so employed; and

4. That the injuries were the result of negligence of the defendant company. 45 USC § 51, et seq., *Fowler* v. *Seaboard Coastline Railroad Company*, 638 F2d 17, 19 (5th Cir. 1981). The defendants in this case do not question the first two elements. The third and fourth elements have been denied, and it is the third element that is the particular bone of contention with the petitioner. The petitioner contends that he was acting within the scope of his employment.

The law is settled that activities not necessarily incident to or an integral part of the plaintiff's employment in interstate commerce are not covered by the F.E.L.A. *Atchison, T. & S.F.R. Co.* v. *Wottle*, 193 F2d 628 (10th Cir. 1952). Cert. granted, 343 U.S. 963, Cert. dismissed by stipulation, 344 U.S. 816 (1952). The Act does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment. *Id.*

In *Atchison, supra*, the plaintiff's decedent finished his day of work and left the toll house where the railroad employees roomed at the railroad's expense; he was free to do as he pleased during his off-time — just as the petitioner was in this case. The plaintiff and a roommate traveled by automobile twelve miles to pick up groceries and bedding, and died in a collision en route. The court stated that the plaintiff was "on a mission wholly unconnected and unrelated to his employment, and his injury while thus engaged cannot be said to be in commerce within the meaning of the Act." 193 F2d at 631. The Court also reiterated the limitations of the Act in stating that:

> Given its most liberal interpretation, the Act cannot be extended to cover activities not necessarily incident to or an integral part of employment in interstate commerce. It obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment. *Id.* at 630.

In *Fowler* v. *Seaboard Coastline Railroad*, 638 F.2d 17 (5th Cir. 1981), the employees were given a paid lunch break. The plaintiff's decedent in *Fowler*, after eating lunch, went outside to examine a motorcycle, which he then rode. The employee was thrown from the motorcycle and killed. On appeal, the court upheld the findings of the trial judge that the motorcycle excursion was a purely private activity, totally unrelated to the employment, and therefore not covered by the Act.

In *Getty* v. *Boston and Maine Corporation*, 505 F2d 1226 (1st Cir. 1974), a railroad employee brought an action against the railroad under the F.E.L.A. to recover for injuries sustained when he fell walking toward the train station platform, where he intended to board a train to travel to his work place. The court held that the employee was not covered by the F.E.L.A., stating, "absent circumstance indicating a special arrangement with one's employer, subjective conditions resulting from employee choices of where to live and how to travel are insufficiently related to employment to

determine the coverage of the federal statute." 505 F2d at 1228.

Similarly, the injury to the petitioner in this case is attributable to a decision over which the railroad had no control. The petitioner's injury was purely the product of his own subjective whims of where to eat and where to go. As was admitted by the petitioner himself, the railroad did not require him to eat at a particular restaurant, nor did it require him to spend his off-duty time in any particular manner.

This court in *Sinkler* v. *Missouri Pacific Railroad*, 356 U.S. 326, 2 L.Ed. 1152 (1958), stated that the FELA "was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Id.* at 329. It was clearly not the intention of the Act to cover injuries sustained in activities wholly unrelated to the railroad employee's employment.

WHETHER OR NOT A PARTICULAR EMPLOYEE IS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT IS NECESSARILY DECIDED ON A CASE-BY-CASE BASIS, AND REVIEW HERE WILL DO LITTLE, IF ANYTHING, TO ASSIST LOWER COURTS.

The petitioner requests the Court to grant certiorari in order to lay down a broad and bold rule defining more clearly what constitutes "scope of employment" for purposes of the Federal Employers' Liability Act, 45 USC § 51, et seq.

A grant of certiorari in this case would do little, if anything, to aid the lower courts. This is because each case involves different facts, and thus must necessarily be decided on a case-by-case basis. It is the contention of the respondent that the lower courts know what the law is and are doing a good job at the difficult task of applying the law to the myriad fact patterns that arise under it. The only conflict is over the facts of a case. Trial judges and appellate court

judges, human beings that they are, will necessarily take opposing views of different fact patterns. That does not mean that they are in conflict as to what the law is.

The Whitley County Circuit Court looked at the undisputed facts of this case and determined as a matter of law that Mr. Combs was not within his scope of employment at the time of the accident. A Writ of Certiorari is not proper in this case because it has long been the settled policy of the Supreme Court not to review factual determinations in which both the trial court and the appellate court have concurred. *Branti* v. *Finkel*, 100 S.Ct. 1287, 445 U.S. 507, 63 L.Ed.2d 574 (1980). It has been repeatedly stated that a Writ of Certiorari will not lie for the purpose of reviewing conclusions of fact or findings of fact and that the Supreme Court accords great weight to the fact finding made by the trial court and approved by the appellate court. *Drumheller* v. *Berks County Local Board No. 1*, 130 F.2d 610 (3rd Cir., 1949); *National Collegiate Athletic Association* v. *Board of Regents of University of Oklahoma*, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984).

In any event, if the definition of "within the scope of employment" is to have any reasonable meaning of limitation, there is no justifiable way to stretch the facts of this case to bring the petitioner within the scope of employment.

> We are not unmindful of the liberal interpretation which the courts have placed, and properly so, upon the Federal Employer's Liability Act, designed for the benefit and protection of railroad employees but, even so, there is a point beyond which its application must be denied. Plaintiff's position in the instant case, if accepted, would come close to stripping it of any limitation." *Quirk* v. *New York C. and St. L.R. Co.*, 189 F2d 97 at 101 (7th Cir. 1951), cert. denied 342 U.S. 871 (1951).

If the Court were to accept Petitioner's theory, there would be no limitation upon coverage of the Act. As the Com-

monwealth of Kentucky Court of Appeals so aptly stated in affirming the judgment of the Whitley Circuit Court:

> We are . . . convinced Mr. Combs' activities at the time of the accident were in no way work related. *Under appellant's [Petitioner herein] interpretation, Mr. Combs would have been covered by FELA if he had injured himself bowling.* Our credulity simply does not stretch far enough to cover this contention. The railroad was not directing Mr. Combs' activities at the time of the accident; he was, as he stated, "on his own" for eight hours. His activities cannot be construed as even approaching the "scope of employment" essential to coverage under the Act. (Emphasis added).

CONCLUSION

For the reasons above, the respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 86-CA-741-S

GEORGE F. COMBS
APPELLANT

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
SEABOARD SYSTEM RAILROAD, INC. and
CORBIN MOTOR LODGE
APPELLEES

Appeal From Whitley Circuit Court
Honorable Emby A. McKeehan, Judge
Action No. 84-CI-535

AFFIRMING IN PART — REVERSING IN PART
(Opinion rendered December 12, 1986, 10:00 a.m.)
NOT TO BE PUBLISHED

* * *

BEFORE: HAYES, Chief Judge, HOWERTON and REYNOLDS, Judges

HAYES, CHIEF JUDGE: The question presented is whether the trial court erred in summarily disposing of appellants' claims for damages stemming from a fall on ice on the premises of Corbin Motor Lodge. We are convinced that summary judgment is inappropriate insofar as the negligence claim against Corbin Motor Lodge is concerned, but appellants' claim under the Federal Employees Liability Act was properly dismissed.

We agree with appellants' contention that since the advent of comparative negligence in this state, *Hilen* v. *Hayes*, Ky., 673 S.W.2d 713 (1984), proof of some degree of negligence on the plaintiff's part no longer operates to bar his claim. Fault becomes a question of degree and measuring the degree of each parties' fault is the province of the jury. Here, we find a plaintiff who followed other patrons in traversing an icy entrance to a restaruant on the Lodge's premises and a business establishment which has allowed ice to accumulate on its sidewalk. Reasonable minds could differ as to the degree of negligence present in each parties' actions and thus the finder of fact is asked to compare the fault of one to that of the other. We are convinced it was error for the trial judge to usurp this function.

Appellants also asserted a claim against L & N and Seaboard for negligence in failing to provide Mr. Combs a safe workplace. The railroad maintains that the trial judge properly dismissed this claim as appellant was not performing his duties or engaging in activities incident thereto at the time of his injury. We agree.

In his testimony, Mr. Combs admitted he was on his own free time for eight hours. We are mindful of the relationship the railroad maintained with the motel, but we are nevertheless convinced Mr. Combs' activities at the time of the accident were in no way work related. Under appellants' interpretation, Mr. Combs would have been covered by FELA if he had injured himself bowling. Our credulity simply does not stretch far enough to cover this contention. The railroad was not directing Mr. Combs' activities at the time of the incident; he was, as he stated, "on his own" for eight hours. His activities cannot be construed as even approaching the "scope of employment" essential to coverage under the Act.

We are cited to cases which appear to go in opposite directions in terms of FELA coverage for activities undertaken during off-duty or enforced rest periods. We have opted to align ourselves with reasoning set forth in *Fowler* v. *Seaboard Coastline R. Co.*, 638 F.2d 17 (5th Cir. 1981), which holds that when an employee undertakes a purely private activity,

even upon his employer's premises, he is denied recovery under FELA. In the instant case, Mr. Combs had stopped for a cup of coffee and was on his way to visiting hours at a funeral home when he was injured. We believe this is purely private activity outside the protection of FELA.

The judgment of the Whitley Circuit Court, as to appellees L & N Railroad Company and Seaboard System Railroad, is hereby affirmed. The judgment as to Corbin Motor Lodge is reversed and the case remanded for further proceedings.

Further, pursuant to 2.(a) of the Order designating the Case as a Special Appeal, the application of CR 76.20 and CR 76.32, as well as other appropriate Rules of Civil Procedure pertaining to further appellate steps, are reinstated effective the date of this opinion.

ALL CONCUR.

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